

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

ROBERT P. LARSEN, JR.
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-392
Case No. 77-7699

S.S.A. No.

EMPLOYMENT DEVELOPMENT DEPARTMENT

Office of Appeals No. F-4998

The Department appealed from the decision of the administrative law judge which held that the claimant had been overpaid benefits in the sum of \$31 and that such overpayment was waived under section 1375 of the Unemployment Insurance Code.

STATEMENT OF FACTS

The claimant filed a valid claim for unemployment insurance benefits in February 1977. A maximum benefit award of \$1,474 was established for him. His weekly benefit amount was \$94. Such award, if the claimant remained entitled to benefits, was to be paid for 15 weeks at a weekly rate of \$94, with a lesser amount being paid for the sixteenth week to exhaust the award of \$1,474. Instead, the claimant was paid \$94 a week for 16 weeks.

By paying the full amount of benefits to the claimant for the sixteenth week, a \$31 overpayment of benefits resulted. The overpayment occurred because of an oversight by the Department in not marking its records properly to show that a lesser amount of benefits should be paid for the sixteenth week. The claimant was in no way at fault in incurring the overpayment.

The Department established the \$31 overpayment on July 29, 1977 since under section 1375-1(d)(3), Title 22,

California Administrative Code, as of July 27, 1977 the claimant, because of his marital status (single), his assets (a fully paid automobile worth \$3,000 and \$350 in savings account), his average monthly income for the past six months (in excess of \$322 a month), and outstanding debts (\$35 to a credit union, \$291 to a credit company, and \$200 to Master Charge), did not meet the standards necessary for a finding that recovery of such overpayment would impose "extraordinary hardship" upon him. The Department concluded as follows:

"REASON FOR DENIAL OF WAIVER:

Your average monthly family income for the past six months in relation to your present assets and liabilities does not indicate that repayment of your overpayment would cause you extraordinary hardship."

When the claimant became unemployed in February 1977 from employment in which he had been making \$900 a month, he had \$500 in his savings account. At the time of the hearing before the administrative law judge on September 13, 1977, he had some outstanding bills and \$250 in his savings account. Debts owed the credit union and Master Charge had been paid off by that time.

The claimant has had no income other than unemployment insurance since becoming unemployed. At the time of the hearing the claimant was living with friends and was "being supported somewhat" by them. He has no dependents. The funds spent by the claimant were for current expenses.

REASONS FOR DECISION

Section 1375 of the code provides that a claimant who is overpaid benefits is liable for the amount overpaid unless the overpayment was not due to fraud, misrepresentation, or wilful nondisclosure on his part, was received without fault on his part, and its recovery would be against equity and good conscience.

The Department has implemented this section through regulations found in Title 22, section 1375-1, California Administrative Code, which state:

"Recovery of Overpayments. (a) General Principle. Except for the relief from liability for overpayments provided by Sections 1380 and 2740 of the code, any person who is overpaid any amount of benefits is liable for the amount overpaid unless all of the following conditions exist.

(1) The overpayment was not due to fraud, misrepresentation, or wilful nondisclosure by the person.

(2) The overpayment was received without fault by the person.

(3) The recovery of the overpayment would be against equity and good conscience.

(b) Scope. This section applies to overpayments of unemployment compensation benefits, extended duration benefits, federal-state extended benefits, and disability benefits.

(c) Fault of the Claimant. In determining fault, the department shall consider the nature and cause of the overpayment and the capacity of the particular claimant to recognize the error resulting in the overpayment. A claimant who receives or retains benefits which he or she knew or reasonably should have known he or she was not lawfully entitled to receive is at fault. The claimant is not at fault if the benefits were retained because of the claimant's good faith reliance on a departmental error. A claimant who negligently reports or fails to report information which results in an overpayment is at fault. If the claimant is at fault he or she is liable for the overpayment.

Example 1. A claimant receives \$160 benefits every 2 weeks. The claimant reports earnings of \$100 per week for a 2-week period. Through departmental error, those earnings are not reflected in the benefit payment and claimant receives \$160 for that 2-week period. The claimant retains the benefits without informing the department of the error. There are no other facts indicating the claimant did not have the capacity to recognize the error or that the claimant relied in good faith on the department's error. In this case, the claimant is at fault because he or she accepted a payment which he or she knew or should have known was incorrect.

Example 2. A claimant applies for benefits and receives notice of an award of a weekly benefit amount of \$80. However, the notice prepared by the department is erroneous and the weekly benefit amount should be only \$60. The claimant is not at fault in the absence of any showing that he or she should have known of the error. Since no such showing appears here, the claimant is not at fault.

Example 3. A claimant reports earnings of \$80 per week when in fact the claimant knew or should have known that his or her earnings were \$100 per week. The claimant is at fault and is liable for the overpayment.

Example 4. The claimant receives and retains benefits from California and from another state for the same week, but does not report the duplication. The claimant is at fault, unless there is a showing that the claimant reasonably misunderstood benefits entitlement, and no such showing appears here. The claimant is at fault and is liable for the overpayment.

(d) Equity and Good Conscience. The department shall, in determining whether the recovery of an overpayment would be against equity and good conscience, consider the following factors:

(1) Notice to Claimant. If an overpayment is created as a result of a decision by an administrative law judge or the Appeals Board which reverses a prior decision granting benefits, the claimant shall not be required to repay the overpayment unless the department has given notice to the claimant that his or her entitlement to benefits has been appealed and that he or she may be required to repay the benefits in the event of a reversal by an administrative law judge or the Appeals Board. If the notice is given, recovery of the overpayment is appropriate unless there has been a change of position by the claimant or recovery will cause extraordinary hardship.

(2) Change of Position. If a claimant has detrimentally changed his or her position in reliance upon benefit payments, the recovery of an overpayment of benefits is against equity and good conscience. A claimant will be considered to have detrimentally changed his or her position in reliance upon the receipt of benefits if the claimant has taken any reasonable action or incurred a necessary financial obligation in the conduct of his or her affairs which the claimant would not have taken but for the receipt of the benefits.

(3) Extraordinary Hardship. If recovery of an overpayment would impose extraordinary hardship on a claimant or the claimant's family, the recovery of the overpayment is against equity and good conscience and shall be waived. In making this determination, the department shall consider the family income and assets of the claimant and other factors, as follows:

(A) Waiver--Family Income. The gross income of the claimant and his or her spouse which is available to the claimant shall be considered to determine whether a reasonable standard of living exists in accord with the family income levels set forth in Table 1 below. As used in this section, "income" includes income from all sources including, but not limited to, unemployment compensation benefits, extended duration benefits, and federal-state extended benefits, and disability benefits. If the claimant's average monthly family income for the preceding six months does not exceed the appropriate level set forth in Table 1 below, the overpayment shall, except as provided by paragraph (3)(B) of this subdivision, be waived by the department.

Table 1
Family Income Level

<u>Persons in Family</u>	<u>Gross Monthly Income</u>
1	\$322
2	495
3	666
4	798
5	948
6 or more	plus \$150 for each addi- tional person

(B) Waiver-Assets and Unusual Circumstances. If a claimant's average monthly family income for the preceding six months does not exceed the appropriate amount set forth in Table 1 above, the department shall consider any liquid or readily convertible assets available to the claimant which may be converted to repay the overpayment without causing extraordinary hardship on the claimant or the claimant's family. Such assets include, but are not limited to, stocks, bonds, interest in mutual funds, cash, and credit union or savings accounts, but shall not include the claimant's home and furnishings therein, automobiles needed for transportation of the claimant or a family member, clothing and tools of the trade. If a claimant's average monthly family income for the preceding six months exceeds the appropriate amount set forth in Table 1 above, the department shall consider any unusual circumstances such as medical expenses or other necessary living expenses which would cause recovery of an overpayment to place an extraordinary hardship on the claimant or the claimant's family.

Example 5. A claimant is married and has two children at home. The average monthly family income for the preceding six months was \$750. The claimant has no readily available assets. Recovery of the overpayment will cause extraordinary hardship and the overpayment is waived.

Example 6. A claimant is married and has two children at home. The average monthly family income for the preceding six months was \$850. The claimant has a home, furnishings, and a car, but no other assets, and no unusual expenses or debts. The overpayment is not waived.

Example 7. Assume the same facts as in Example 6, except that the claimant pays \$100 a month in outstanding medical bills which total \$5,000. Recovery of the overpayment will cause extraordinary hardship and the overpayment is waived.

(C) Recovery-Current Family Income and Assets. If the department has not waived the overpayment, the department shall establish, by mutual agreement if possible, a repayment

schedule at the time of the overpayment determination. In establishing the repayment schedule the department shall consider the current family income and assets of the claimant, as follows:

(i) If the claimant's family income for the 4-week period immediately preceding the date on which recovery is sought, exceeds the appropriate amount set forth in Table 1 above, the excess for that period is available to repay the overpayment unless there are unusual circumstances such as medical expenses or other necessary living expenses. In cases of such unusual circumstances, the repayment amount shall not be less than \$10 per month. The department shall also consider any liquid or readily convertible assets as set forth in subparagraph (ii) below.

(ii) If the claimant's family income for the 4-week period immediately preceding the date on which recovery is sought does not exceed the appropriate amount set forth in Table 1 above, the department shall consider any liquid or readily convertible assets available to the claimant which may be converted to repay the overpayment without causing extraordinary hardship on the claimant or the claimant's family. Such assets include, but are not limited to, stocks, bonds, interest in mutual funds, cash, and credit union or savings accounts, but shall not include the claimant's home and furnishings therein, automobiles needed for transportation of the claimant or a family member, clothing, and tools of the trade.

Example 8. The claimant is married and has two children at home. The claimant's family income for the 4-week period immediately preceding the date on which recovery is sought was \$810. The claimant has a home, furnishings therein, and a car, but no other assets, and has no unusual expenses or debts. The repayment schedule may provide for a maximum payment of \$12 per month (\$810 minus \$798).

Example 9. The claimant is married but has no children. The claimant's family income for the 4-week period immediately preceding the date on which recovery is sought was \$460. Claimant also has stocks valued at \$300. The

repayment schedule may provide for a minimum payment of \$10 per month and a lump sum recovery for the resale value of the stocks, less costs of sale.

Example 10. Assume the same facts as in Example 8, except that the claimant pays \$40 monthly in outstanding medical bills which total \$500. The repayment schedule may provide for a minimum payment of \$10 per month.

(e) Information. Whenever the department determines that an overpayment is probable, it shall notify the claimant of the probable overpayment, the claimant's right to request that the department waive the overpayment, and the standards to obtain a waiver of the overpayment. The department shall assist and advise the claimant in meeting his or her obligation to furnish the department with all information necessary for the department to determine whether there is an overpayment, whether the claimant is entitled to waiver of the overpayment and for establishing the repayment schedule.

(f) Adjustment of Repayment Schedule. If at any time a claimant requests the department to adjust his or her repayment schedule, the department shall do so if the claimant demonstrates that there has been a material change in his or her financial condition. If the overpayment interviewer and the claimant cannot agree on the requested adjustment, the field office manager shall prescribe the appropriate repayment schedule adjustment, if any. No administrative appeal is provided from an adjustment of or refusal to adjust a repayment schedule.

(g) Overpayment Notice and Hearing. If the department determines that an overpayment exists, it shall notify the claimant of the amount of the overpayment, the cause of the overpayment, the reasons for denial of waiver if waiver is denied, the terms of the repayment schedule established under subdivision (d)(3)(C) of this section and the right to appeal (see Sections 1377, 2737, 3751, and 4751 of the code) to an administrative law judge, and to a hearing on all issues regarding the overpayment, including any determination

denying waiver of the overpayment and the terms of such repayment schedule. When a waiver of an overpayment has become final, it shall not be redetermined in the absence of fraud, misrepresentation, or wilful nondisclosure by the claimant relating to the waiver."

Considering each of the three elements set forth in section 1375-1(a), it is apparent that subsections (1) and (2) are not at issue in this case as there is no question of fraud, misrepresentation, wilful misconduct, or fault in this instance.

The matter to be resolved pertains to subsection (3) and presents the question of whether recovery of the overpayment would be against equity and good conscience.

The portions of 1375-1 which are pertinent to the question before us are found in subsection (d). With reference to this issue, however, it is essential that we consider the holdings of the court as well as the precedent decisions of this Board, which are, of course, binding on the Department. In Appeals Board Decision No. P-B-368 it was stated that:

"It is appropriate that attention now be turned to deciding whether it would be against equity and good conscience to require the claimant to repay the overpayment.

"In including the phrase 'equity and good conscience' in section 1375 of the code it is apparent that the legislature intended that benefits overpaid be recovered only after a careful and deliberate consideration of all of the factors leading up to the overpayment and a complete evaluation of the results to the claimant in imposing recovery of the overpayment."

In discussing equity and good conscience, the court stated that the following in Gilles v. Department of Human Resources Development (1974), 11 Cal. 3d 313, 113 Cal. Rptr. 374:

". . . Such broad terms [equity and good conscience] necessarily anticipate that the trier of fact, instead of attempting to channelize his decision within rigid and specific rules, will draw upon precepts of justice and morality as the basis for his ruling [and] . . . a panoramic vision that encompasses all factors which might persuade an individual -- or a government -- of good conscience to forego recoupment of moneys previously paid."

* * *

". . . A person of 'equity and good conscience,' we believe, would additionally consider such matters as the cause of the overpayment, whether the claimant received only normal unemployment benefits or some extra duplicative benefit, whether the claimant changed his position in reliance upon receipt of the benefit, and whether recovery of the overpayment, by imposing extraordinary hardship on the claimant, would tend to defeat the objectives of the Unemployment Insurance Code."

It appears to us that it is the position of the Department that the law of "equity and good conscience" in regard to overpayments is to be found only within the confines of section 1375-1(d), above quoted. We do not agree with this position. The length of the regulation, and numerous examples provided, demonstrate the difficulty of drafting an all-encompassing statement on the subject of "equity and good conscience." In our judgment it is next to impossible, if not impossible, to draft such a statement. Such matters must be decided on an oft-repeated principle, namely, a case-by-case basis. In this respect it is appropriate to note that the scope of review of an administrative law judge extends from the date of the Department's determination to the date of hearing (section 5037, California Administrative Code, Appeals Board Decision No. P-B-67). Much can transpire between these dates which could substantially affect the question of whether recovery of the overpayment would impose extraordinary hardship.

We are persuaded to follow the broad and general guidelines of the Gilles case and, accordingly, we must conclude that a determination and application of good conscience cannot be tied down to rigid and specific rules such as are set forth in the above-quoted regulation.

In our judgment, section 1375-1 serves only as a guide to the Department in its internal operations, in deciding whether or not to establish an overpayment. It can also, of course, be used in hearings as argument to show why the Department took the action it did in regard to an overpayment issue, but in and of itself section 1375-1 cannot be finally determinative.

Accordingly, in light of the broad and general guidelines set forth in the Gilles case, section 1375-1, Title 22, California Administrative Code, which endeavors to establish rigid and specific rules, is not binding on this Board or its Administrative Law Judges appointed pursuant to sections 403 and 404 of the code.

We now turn our attention to a review of the factors enumerated in the Gilles case, as they relate to the instant case. First, we note that the cause of the overpayment was the error of the Department in not correctly marking its records. We have previously held that even though there is no fault on the claimant's part, the mere fact that an overpayment is due to the error of the Department does not establish in and of itself that recovery of the overpayment would be against "equity and good conscience." (Appeals Board Decision No. P-B-377)

As there is no question of duplicative payments, that factor requires no comment.

Next, however, it is apparent that the claimant did change his position in reliance upon receipt of the benefits. From February 1977, when the claimant became unemployed, to the date of the hearing before the administrative law judge, the claimant's savings were depleted by one-half and the benefits received were spent. These funds were spent on current expenses, which we must assume were for necessities of life. The specific bills paid off by the claimant between July 27, 1977 and the date of the hearing would give this indication.

Finally, the court in Gilles places considerable emphasis on the factor of whether the repayment of the overpayment would impose "extraordinary hardship" on the claimant which would defeat the objective of the Unemployment Insurance Code.

In determining extraordinary hardship, consideration must be given to such factors as the size of the overpayment, present income, present expenses, past due expenses, and assets accumulated from past income. None of these factors alone can be determinative; rather all must be considered to establish the claimant's present economic status and the impact of requiring repayment.

Certainly if a claimant has a present income in excess of current and past expenses, there can be no extraordinary hardship. This, however, would be an unusual situation when one is or has been unemployed and therefore it will ordinarily be necessary to turn to a consideration of assets accumulated from past income, including the character of those assets. It surely would create an extraordinary hardship to require a claimant to sell his means of transportation (perhaps the very means of obtaining or maintaining employment), or his home.

Accumulated money assets pose a more difficult question. It is frequently assumed that if one has money one can pay. This base assumption, however, ignores whether or not such payment will create extraordinary hardship. This then comes back to the size of the overpayment in relationship to the assets.

This leads us to the facts of this case. At the time a decision had to be made as to whether to set up an overpayment, namely, at the end of July 1977, the claimant had assets of \$350 in a savings account, an automobile, and \$94 a week in benefits. Along with current expenses for necessities of life, he had debts totaling \$526. Most of these debts were paid off by the date of hearing before the administrative law judge and his savings were depleted to \$250. We mention these last two facts merely to indicate that it would appear that all of the claimant's expenditures were paid for current expenses for necessities of life.

The facts of this case are very close as to whether "extraordinary hardship" would be imposed in requiring the claimant to make repayment of the \$31. The claimant did have assets at the time a determination was to be made regarding repayment. Also, the overpayment was small. But, on the other hand, the amount of the savings

was being slowly depleted to meet payments for the necessities of life. Also, the claimant changed his position in reliance upon receipt of such benefits.

In such a close situation as this, in our judgment the scale should be tipped in favor of the claimant.

Such a conclusion is in line with the dictate in Garcia v. California Employment Stabilization Commission (1945), 71 Cal. App. 2d 107, 161 Pac. 2d 972, that the Unemployment Insurance Code is to be interpreted liberally to effectuate the objectives of the statute. Accordingly, under the Gilles case, good conscience dictates that recoupment be foregone under the present factual situation.

We therefore conclude that the overpayment must be waived in the instant case.

DECISION

The decision of the administrative law judge is affirmed. The overpayment is waived.

Sacramento, California, May 25, 1978.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

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